(1)

Supreme Court, U.S.
FILED

001843 JUN - 4 2001

No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 2001

NORMAN P. KOSTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

NORMAN KOSTER
98081-024
FEDERAL PRISON CAMP
POST OFFICE BOX 1085
OXFORD, WI 53952
Petitioner

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12 pp

QUESTION PRESENTED

Whether this Court should grant a Writ and issue a Certificate of appealability as to the September 26, 2000 Order and Judgment of the Northern District of Illinois, Judge Philip G. Reinhard presiding. Which denied the motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. 2255.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Petitioner, Norman P. Koster and the Respondents, the United State of America.

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Pro Se Petitioner, Norman Koster, respectfully requests a Writ of Certiorari for Issuance of a Certificate of Appealability.

OPINIONS BELOW

The opinion of the United States District Court, Northern District of Illinois is reported *at U.S.A. vs. Norman Koster* 00 C 50217 9-26-2000. The opinion of the Court of Appeals for the Seventh Circuit has not been reported.

JURISDICTION

The order of judgment of the Northern District of Illinois, Judge Philip G. Reinhard presiding was entered September 26, 2000 which denied Koster's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. 2255. A Motion for Issuance of Certificate of Appealability was denied November 7, 2000 by the same Court: On March 14, 2001 the Court of Appeals for the Seventh Circuit denied a Motion for Issuance of Certificate of Appealability. The September 26, 2000 2255 order, the November 7, 2000 and March 14, 2001 denial of Certificate of Appealability are entered in the Appendix. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 2253 and Rule 10(a).

STATEMENT OF THE CASE

1. Federal Farmer's Assistance Programs

The Commodity Credit Corporation (CCC) is a government corporation which assisted farmers through loans and other programs. The CCC was administered through county offices called the Agricultural Stabilization and Conservation Service (ASCS) an agency within the United States Department of Agriculture. One program, the Set Aside Program paid a farmer cash for idling certain fields. Farmers participating in that program would submit a farm operating plan identifying the land farmed, identify of landowner, type of lease, contributions of farmer, and in later years, any changes in the structure of the operation.

The CCC also provided loans to farmers under the Farm Stored Loan Program. Under that program a farmer enrolled in the Set Aside Program could receive low interest loans from the CCC while pledging their grain as collateral. In the event farmers were overdue on loan payments owed to the CCC, the CCC was authorized to offset that debt by keeping payments owed to the farmers under the Set Aside or Farm Stored Program.

2. Koster's Relationship with the CCC

Koster began farming in 1976. In the early 1980's Koster experienced financial difficulties as a result of low commodity prices and high interest rates. A drought in 1983 left Koster insolvent. By 1985 Koster was delinquent to ten

creditors including the CCC who Koster owed more than $600,000.00. With no financing Koster was forced to give up his position as farmer and became a farm manager and manager of Sterling Grain & Storage, Inc. (Sterling) which stored grain for farmers and the government. Koster maintained these positions from 1986 through at least 1995.

Koster entered into a number of business relationships where in his goal was to have persons or businesses qualify for the Set Aside Program. Koster's involvement in these applications was open and obvious. He hid or disguised nothing. In 1988 the same prosecutor brought criminal charges against Koster for alleged illegal conversion of pledged collateral (corn) which Koster was acquitted. The jury was directed by instruction to the drought of 1983 for the shortage, not an illegal conversion. The government in the present case argued the purpose of the participation of others was an attempt to avoid set off provisions, which would have reduced Koster's debt. Koster's defense was that the program allowed for these arrangements and that similar arrangements were made by other farmers in various districts.

1. On January 21, 1997, Koster was charged in a twenty-nine count indictment – ten counts of mail fraud, six counts of money laundering with mail fraud as the underlying offense, four counts of causing the interstate transportation of a security obtained by fraud, and nine counts of making false statements to the CCC. Prior to trial the government immunized all of the third parties whom the government presented as witnesses to prove that Koster set up as strawmen owners and renters in order to avoid repaying his debt to the CCC. Their trial

testimony confirmed these witnesses had received immunity not only for the alleged scheme involving Koster, but for other crimes as well. For example a number of witnesses admitted to filing false tax returns.

Koster testified that with the corporation, Sterling, with his wife as principle owner, approved and enrolled in the Set Aside Program, there was no reason to use third parties as the government alleged. The government could not and did not refute the existence of the corporation.

Koster's attorney attempted to demonstrate to the jury that even if Koster used third parties as the government claimed, county ASSC Committees had approved such plans for other farmers in the past.

The Court refused to allow counsel to present that evidence.

2. On Otober 27, 1997 Koster went to jury trial on the counts charged in the indictment. His trial attorney asked for two good faith instructions, one for the false statements and one for the mail fraud charges relying on a case on point out of the 5th Circuit. The Court denied both instructions.

3. On November 4, 1997 the jury returned guilty verdicts on all twenty-nine counts against Koster.

4. On March 5, 1998 Koster was sentenced to seventy-eight months in prison ten counts to run concurrently with sixty months in prison on the remaining nineteen counts, plus fines and surcharges. Koster is presently incarcerated at

Federal Prison Camp, Oxford, WI. The Court entered an amended sentencing order on March 10, 1998 which addressed the forfeiture allegations.

5. Koster filed a notice of appeal on March 17, 1998.

6. On direct appeal Koster's sole argument was denial of the good faith instructions. On December 16, 1998 the Court of Appeals for the Seventh Circuit affirmed the judgement.

7. Koster filed a timely petition for Writ of Certiorari with the United States Supreme Court. The United States Supreme Court denied the Writ of Certiorari on June 21, 1999 after the government briefed.

8. Koster subsequently filed a petition for rehearing with the United States Supreme Court based upon the *United States v.Neder* ___ U.S.____119 S.Ct. 1827 (1999) arguing good faith as an essential element to a specific intent crime. The Court denied that petition on August 23, 1999.

9. On June 20, 2000 Koster filed a Motion with the District Court to vacate, set aside or correct sentence pursuant to 28 U.S.C. 2255. Koster based his petition on the following grounds.

(a) Koster was denied a constitutionally fair trial because the Court failed to instruct the jury that materiality was an essential element as to the mail fraud counts pursuant to the

United States Supreme Court ruling in *United States v. Neder*, ___ U.S.____, 119 S.Ct. 1827 (1999).

(b) Koster was denied a fair trial because the jury was not instructed as to the money laundering counts, that the underlying mail fraud counts required a finding of material misrepresentation as required by *Neder*.

(c) Koster was denied a constitutionally fair trial because certain government witnesses against him were offered improper inducements, that is, a thing of value contrary to 18 U.S.C. 201(c)(2) and the Seventh Circuit's decision in *United States v. Condon*, 170 F. 3d. 687 (7th Circuit, 1999).

REASONS FOR GRANTING THE WRIT

Pro Se Petitioner, NORMAN KOSTER, (Koster) submits that a Certificate of Appealability should issue because the evidence and argument presented below meet that standard.

To obtain a Certificate of Appealability, a habeas prisoner must make the "substantial showing of the denial of a constitutional right" required by 28 U.S.C. 2253(c). Slack v. McDaniel, 529 U.S. 473, 146 L. Ed. 2d. 542, 120 S.Ct. 1595, 1603 (2000). The Slack Court held this means...

> "Showing that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues

presented "were adequate to deserve encouragement to proceed further ".

The District Court determined that Koster failed to make a substantial showing of denial of a constitutional right.

In *Neder v. United States*, 527 U.S. 1, 4, 144 L. Ed. 2d. 35, 119 S.Ct. 1827, 1838 this Court held that the failure to instruct on an element violated a defendant's due process right to a fair trial, just as the erroneous admission of evidence is contrary to the Fifth Amendment's guarantee against self incrimination and the erroneous exclusion of evidence is contrary to the Sixth Amendment's right to confront witnesses. Contrary to the District Court's conclusion, an issue involving the denial of a defendant's due process right to a fair trial is a issue of constitutional magnitude.

In the holding of Slack if a petitioner presents a substantial issue of constitutional law, then a substantial statutory issue may be appended to a Certificate of Appealability 120 S.Ct. at 1604. If in fact government witnesses received improper inducements "things of value" in exchange for their testimony contrary to 18 U.S.C. 201(c)(2) and the Seventh Circuit's decision in *United States v. Condon* 170 F. 3d. 687 (7th Circuit, 1999) a violation occurred.

The District Court's premise for denying the Certificate of Appealability has no merit.

THE MATERIALITY ISSUE

The District Court in its 28 U.S.C. 2255 denial recognized that *Neder* requires a separate instruction of material for mail fraud but concluded that the error was harmless as the jury necessarily found materiality through its guilty verdicts on the false statement counts premised on 15 U.S.C. 714 M(a) Koster agrees that the jury was given the material instruction for the false statements. Koster disagrees with the District Court that the jury necessarily found materiality in the false statement counts.

Koster's trial counsel requested two good faith instructions, one for false statements and one for mail fraud relying on a case on point out of the 5th Circuit. The Court denied both instructions. (See appendix D copy of transcript of instructions conference p. 1566-1567). Koster's theory of defense was that he in good faith relied on the committees approval of the Set Aside Program Plans. (See appendix E, copy of transcript of testimony of defendant Koster). The Court tendered the material instruction for the false statements at the instructions conference. Koster's counsel objected to the material instruction being given and made no mention of material for the false statements in his closing argument. (See appendix F, copy of transcript of instructions conference p. 1558).

In *Neder* citing *United States v. Gaudin* 515 U.S 509 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1998).

> In general, a false statement is material if it has "a natural tendency to influence, or is capable of influencing, the decision of the decision making body to which it was addressed".

Koster submits that the charged false statements concerned a matter that was immaterial to influence the CCC, the decision maker for a scheme to defraud. The false statement charges premised on information submitted to the ASCS County Committee to establish elgibility for Set Aside payments for two alleged strawmen, Joe L.Michlig (Michlig) and Jerome Lauer (Lauer). (See appendix G. copy of Government brief p. 12). Koster was listed on the applications for the Set Aside Program as providing management for Michlig and Lauer. (See appendix H, copy of transcript of testimony of McDonnell p.590, 1178). As a result of a year end audit, Lauer was ruled ineligible. With Koster listed as manager. Sterling enrolled as successor to Lauer. (See appendix I, copy of transcript of testimony of McDonnell p. 1179). Sterling succeeded Michlig two years later in the Set Aside Program.(See appendix J, copy of set aside program participants). Koster sought to admit into evidence wives, corporations, individuals, as Koster had enrolled that were acceptable to the ASCS in other farm operations. The Court denied the Motion. The charged false statements turned on the eligibility of the enrolled participants not rising to a scheme to defraud. Given the eligibility of Sterling, the identity of the Set Aside participants was immaterial to the ASCS with Koster as manager for Michlig, Lauer or Sterling. Koster's testimony, with the immateriality to the identity of the enrolled participants, supports his good faith reliance on the ASCS

approval of the enrolled. (See appendix E, copy of transcript of testimony of Defendant, Koster). The jury was not squared on the charged false statements being immaterial to a scheme to defraud as Koster's counsel made no mention of material and objected to it being given. Counsel fashioned his defense on good faith.

Koster doesn't rest his argument above of the jury not finding material for the mail fraud / money laundering through the material false statements as the District Court found. Koster below submits the evidence that any misrepresentation was not material to the mail fraud / money laundering charges. The government in its brief in opposition submitted claims that landowners swore under oath they had rented to Norman Koster and not to Michlig and Lauer. This claim is misplaced. (See appendix K, copy of Government brief p. 13). Glenn Moody, 4-D Farms Inc., Farm manager (Moody) testified that Norman Koster had farmed 4-D since 1980. (see appendix L, transcript of testimony of Moody p. 901). Moody under cross examination testified that in 1986 4-D wanted a tenant instead of Koster whom they knew to be able to pay the rent after the problem of collecting rent from Koster in 1985. (see appendix M, transcript of testimony of Moody p. 941). Farmed 4-D land and being a tenant or leesee are separate distinctions. Koster's insolvency was shown in later years including the period of the alleged scheme to defraud. (see appendix N, transcript of testimony of defendant Koster p. 1355). With a specific instruction on materiality on the mail fraud charges, Koster could have and would have argued that any misrepresentation as to the identity of the tenant was not in furtherance of a scheme to defraud, the actions taken by the farm manager

Moody was intended to protect the financial interests of the landowner. Koster further submits the identity of the tenant was immaterial of the landlord. (see appendix O, testimony of Schmitt and Nolte p. 823,824,999).

Reasonable jurists could debate if material was found in the charged false statements with the immateriality shown above as to the identity of the Set Aside participants and Koster's counsel making no mention of material, even objecting to it.

Without a necessary finding of material for false statements, reasonable jurists would debate if material was found for mail fraud / money laundering through false statements especially in light of the evidence showing any misrepresentations being immaterial to the charged mail fraud with the actions of 4-D's farm manager.

Reasonable jurists could debate whether an evidentiary hearing should be held to establish the excluded evidence of other Set Aside participants which were similar to the actions taken by Koster.

This Court should grant a writ and issue a Certificate of Appealability to this constitutional issue of an omitted element and evidentiary hearing.

THE INDUCEMENT ISSUE

In *U.S. v. Condon* 170 F. 3d. 687, 689 (7th Circuit, 1999) "Foregoing criminal prosecution (or securing a lower

sentence) is not a "thing of value" within the meaning of 18 U.S.C. 201(c)(2). All 201 speaks of valuable things "received" by the person whose conduct is to be influenced. Although cancellation of a private debt could be a "thing of value" in the statutory sense, payment of a "debt to society" by providing testimony is a different animal altogether."

The Government in its Response in Opposition to 28 U.S.C. 2255 acknowledged certain government witnesses were immunized prior to their testimony under 18 U.S.C. 6002. This was disclosed to the defense. Further in its response the government emphatically stated it never forgave any tax liability, asked any state or federal agency to forgive any tax liability or promised any witness such a forgiveness of tax liability as an inducement to provide testimony or otherwise. The government called Koster's claim of tax forgiveness a libelous accusation, said it was untrue, and said claim should be ordered stricken from the record. (see appendix P, copy of Government brief p. 13-14). The District Court accepted Koster's showing that at least one witness, alleged strawman Joe L. Michlig received forgiveness on a tax obligation on at least $115,000.00 of income for testimony. The Court further ruled any vioaltion of 18 U.S.C. 201(c)(2) from this conduct is not a rule requiring exclusion of evidence. The Court held the dicta in Condon does not change the longstanding precedent of Barrett. Barrett 505 F. 2d. 1091, 1100-1101 (7th Circuit, 1974) was a plea bargain with leniency. As part of the plea the witness agreed to testify, plead guilty to several counts of conspiracy and mail fraud, and to two counts of filing false income tax returns. The dicta in Condon does not violate the holding of Barrett. Barrett was a leniency case with guilty

pleas and terms of imprisonment. Koster's was forgoing criminal prosecution under 18 U.S.C. 6002 with witness free of any criminal charges given truthful testimony and no false statements.

Koster doesn't seek as a remedy an exclusion of the evidence. He asks for a trial with witnesses without financial inducements. Government witness, alleged strawman, Joe L. Michlig, which the District Court recognized had apparently received a tax forgiveness, answered defense attorney questions, "I don't know", "I don't remember," "Not that I recall" at least twenty-nine times, including not remembering that he was enrolled in the Set Aside Program with his father in the first several years. Koster submits Michlig's memory would improve especially if forgetting those important answers for the defense would mean he would have to pay the taxes. (see appendix Q, transcript of testimony to Michlig p.696). With Michlig under 18 U.S.C. 6002 immunity, the government still carries the sword of perjury.

Koster requests an evidentiary hearing to establish who received inducements and what they received, and a remedy if "things of value" were in fact given

CONCLUSION

The evidence and argument put forth above demonstrates Koster has met the standard of a substantial showing of the denial of a constitutional right.

Petitioner, NORMAN KOSTER, respectfully requests this Court grant a Writ of Certiorari and issue a Certificate of Appealabilty.

RESPECTFULLY SUBMITTED
NORMAN KOSTER,

Norman Koster

Pursuant to 28 U.S.C. 1746(2), I declare under penalty of perjury that the foregoing instrument is true and correct. Executed this 14th day of May, 2001.

NORMAN KOSTER,
98081-024
Federal Prison Camp
Post Office Box 1085
Oxford, WI. 53952

Subscribed and Sworn before me
this 14th day of May, 2001

Linda Koster
NOTARY PUBLIC

APPENDIX

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UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

U.S.A. vs. NORMAN KOSTER

Named of assigned Judge	Philip G. Reinhard
Case Number	00 C 50217
Date	09/26/2000

DOCKET ENTRY:

(10) X [Other docket entry] For the reasons stated on the reverse, defendant, Norman Koster's section 2255 motion and request for evidentiary hearing are denied

"S/ Philip G. Reinhard",

ORDER

Defendant, Norman Koster, was convicted of various count of an indictment in violation of 15 U.S.C. § 714M(a), 18 U.S.C. §§ 1341, 1956(a)(1)(B)(i), 2314, and forfeiture of certain property. On appeal of his convictions on the sole issue of error of the district court's refusal to instruct the jury on his defense theory that he acted in good faith in compliance with government regulations and relied on approval of the government, the judgment was affirmed in United States v. Koster, 163 F.3d 1008 (7th Cir. 1998), cert. denied, 527 U.S. 1021 (1999). Koster has timely filed a motion to vacate, set aside or correct sentence pursuant to U.S.C. § 2255 contending (1) his convictions on the mail fraud and money laundering counts were constitutionally unfair because the court failed to instruct the jury that materiality was an essential element of mail fraud, relying on Neder v. United States, 527 U.S. 1 (1999); and (2) the government induced the testimony of certain trial witnesses by forgiving their own debt to the IRS or state taxing authorities in violation of the federal bribery statute, 18 U.S.C. § 201 (c)(2). He requests evidentiary hearing on the latter issue.

The government's response to these contentions is that Koster, who failed to raise either contention at trial or on appeal, is barred from obtaining collateral relief because he cannot sow cause for his failure to raise these claims at trial or on direct appeal or show actual prejudice arising from such claims of error the standard of United States v. Frady, 456 U.S.

152 (1982). Examining first the issue of the Government's forgiveness of an income tax liability for certain government witnesses, the court finds no prejudice to Koster as no error in this regard has been shown. Even if a government witness was forgiven from paying income tax for several years during which he had falsified his tax returns to cooperate with Koster in his fraudulent scheme, as is apparently the fact as testified to by witness Joseph Michlig, any violation of 18 U.S.C. § 201 (c)(2) from this conduct is not a rule of evidence requiring exclusion of evidence. United States v. Condon, 170 F. 3d 687, 688-89 (7th Cir. 1999), cert. denied, 526 U.S. 1126 (1999), (citing United States v. Barrett, 505 F. 2d 1091, 1100-03 (7th Cir. 1974)). The dicta in Condon relied on by Koster does not change the longstanding precedent of Barrett. According, relief on this basis is denied and there is no reason for an evidentiary hearing.

On the issue of the now established error in the failure to instruct the jury that materiality is an element of mail fraud which must be proven by the government (Neder v. United States, 527 U.S.1 (1999)), the court must initially determine whether the Frady review analysis of cause and actual prejudice in section 2255 collateral review cases or the harmless-error analysis of Chapman v. California, 368 U.S. 18 (1967), as suggested by Koster, is appropriate. In Neder, a direct review case, the Supreme Court determined a harmless-error analysis was appropriate and remanded to the Court of Appeals for application of this standard. Neder, 527 U.S. at 25. In Lanier v. United States, 205 F. 3d 958, 964 (7th Cir.2000), the Seventh Circuit, in the context of an appeal in a

section 2255 proceeding, applied the harmless-error test in a faulty instruction case, citing Neder. This court will apply the standard for harmless error review: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty beyond a reasonable doubt." Neder, 527 U.S. at 18; Lanier, 205 F. 3d at 964. Except for who has the burden, this standard does not appear to be significantly inconsistent with the prejudice formulation in Frady. See Frady, 456 U.S. at 168-69. Even applying Frady as to whether Koster has shown cause, it is arguable no procedural default occurred here for failure to raise the instructional issue at trial or on his direct appeal, as controlling circuit precedent rejected such a claim, see United States v. Coffman, 94 F. 3d 330, 335 (7th Cir. 1996), cert. denied, 520 U.S. 1165 (1997), and an attempt to do so would have been futile. In any event, the court need not address this question as it finds the error here in the context of all the evidence was harmless beyond a reasonable doubt.

The government contends that viewing all the instructions given in this case the issue of materiality of falsehood in the mail fraud scheme was squarely before the jury. This contention is supported in United States v. Pribble, 127 F. 3d 583, 589 (7th Cir. 1997), cert. denied, 522 U.S. 1118 (1998), but this is a pre-Neder case and court prefers to primarily base its decision on other grounds. The court agrees with the government's alternate arguments. It contends that the jury necessarily found materiality through its guilty verdicts on the false statement counts premised on 15 U.S.C. § 714M(a). See Lanier, 205 F. 3d. at 964-65. The false

statements alleged in these counts were generally alleged as part of the overall mail fraud scheme described in Count one. The jury was instructed as to the false statement counts that the government must prove the false statement was material, and the definition of material was properly given in another instruction. Thus, it can be concluded that the omitted instruction was harmless, as the guilty verdicts of the jury on the false statement counts would necessarily supply the predicate for the guilty verdicts on the mail fraud and money laundering counts.

The court also finds the evidence of materiality was overwhelming. As thoroughly set forth in the government's brief, see U.S. Resp., pp. 11-13, numerous witnesses testified to the falsity of Koster's representations which were the crux of the fraud scheme. These alleged misrepresentations were overwhelmingly shown to be material.

The motion pursuant to section 2255 is denied as is the request for an evidentiary hearing.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

U.S.A. vs. NORMAN KOSTER

Name of assigned Judge	Philip G. Reinhard
Case Number	2000 C 50217
Date	11/7/2000

DOCKET ENTRY:
(10) X [Other docket entry] Defendant has filed a notice of appeal and a motion for issuance of a certificate of appealability from this court's order of September 26, 2000 denying relief pursuant to 28 U.S.C. § 2255. A certificate of appealability may issue only if defendant has made a substantial showing of the denial of a constitutional right. Neither of the two issues raised here make such a showing, and the motion for the certificate is denied for the reasons set forth in the September 26 order.

"S/ Philip G.Reinhard"

Appendix B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted March 9, 2001
Decided March 14, 2001

Before

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 01-1142

NORMAN KOSTER
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee,

Appeal from the United States District Court for the Northern District of Illinois, Western Division

No. 00 C 50217

Philip G. Reinhard, *Judge.*

Appendix C 1 of 2

ORDER

Norman Koster moved to vacate, correct or set aside a sentence pursuant to 28 U.S.C. § 2255. The district court denied the motion and declined to issue a certificate of appealability. Koster now has filed an application for a certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED.**

defendant's instruction.

(Laughter.)

THE COURT: If you want to put it as one of yours—I'm going to give it.

Mr. Meyer: Okay.

THE COURT: Let's see.

MR. MEYER: Number 3.

THE COURT: We're on Number 3. And I have a reservation about that. Does the government object?

Mr. ZUBA: Absolutely, Judge.

THE COURT: That really is a – what was set forth in the Drake case? What do you call that? A reliance, but there's another name for it.

MR. SYFERT: An authorization defense, Judge.

THE COURT: An authorization defense. I don't think here's proofs here for an authorization defense; although, that's kind of what this good faith is aiming at. In any event, you can argue, but I -- if you've got any authority other than the Fifth Circuit case.

MR. ZUBA: And the element of willfulness isn't in this case.

THE COURT: I understand.

MR. HORNING: Well, I think that the Clark case hits it on the head. If good faith is a defense to the whole mail fraud, it goes to the issue of the knowledge. Without the

knowledge element to be met by the government, the government can't prove its case.

THE COURT: That's right, and I think the knowledge instruction tells them that. They have inadvertence, mistake is a part of what they have to show – or the converse of what they have to – of knowingly. This is not applicable, as far as I'm concerned. I will refuse it over objection.

And the next one is Defendant's Number 4. It's also a good faith defense, and I'm going to refuse that for the same reasons.

Number 5 of the defendant is 3.08, and haven't we –

MR. SYFERT: This is the one, Judge, that we had a

sentence missing. The last sentence was missing from ours.

And so, we withdraw ours.

MR. ZUBA: We'll redo it as Defense 5-A, if you'd like.

THE COURT: Would you do that?

MR. ZUBA: Sure.

THE COURT: Just to get the proper typeset.

All right. I will only refuse this – or, actually, I'm going to give the 5-A, but I'm refusing it because the typeset is different.

Number 6 is 3.27. Is that withdrawn?

MR. MEYER: Number 7, 3.15. Is that withdrawn? Are

A Sterlin Grain & Storage only.

Q Only, correct?

A Yes.

Q And in 1995?

A No one signed up. Sterling Grain & Storage did not sign up in 1995.

Q In your discussions of – strike that. Since 1990 up through '93, the farm operating plans that you submitted, you didn't submit – you submitted for the individuals, but not independent of them, did you?

A No, I did not.

Q You discussed them with them. correct?

A On occasions, yes. I will not say on all, but on occasions.

Q And, in fact, they attempted to qualify for the farm set-aside program; is that correct?

A That's correct.

Q And you relied and they relied on the committee's approval of those plans?

A That's correct.

MR. MEYER: That's all I have, your Honor.

THE COURT: All right. Thank you.

Mr. Zuba. If the jurors want to stand up, you can.

You just came back, but…

(Brief pause.)

then there's an "or whoever willfully overvalues any security."

There's not a willful in this – is there a case that you found?

THE LAW CLERK: Not from the Seventh Circuit.

THE COURT: okay. But I think this is proper. I'm going to give this one, and I'm going to refuse the other one when we get to it.

MR. MEYER: Okay.

THE COURT: That shall be given.

Number 28 comes out of Volume III, Page 53, of the Seventh Circuit Pattern Instructions. I think it's okay. It takes out the fictitious. This isn't a fictitious case. If there's no objection, I'll give that.

MR. MEYER: No objection.

THE COURT: Thank you.

The next is 29, which is the definition of material.

I have given this in the past, and I'd tend to give it here.

Any objections?

MR. MEYER: Well, yes. I'm not sure where it applies here in terms of what would be material that they would have relied on that wasn't on the face of the document. I mean, there isn't – O don't know that there's any evidence of anything outside of the documents.

THE COURT: Is material in one of the –

MR. ZUBA: It's in the false statement.

Certifications submitted to the Agricultural Stabilization and Conservation Service (ASCS) in the names of Lauer, Michlig and 4-D Farms. The materiality of the representations contained in these documents was undisputed, even by the defendant. 9 This is understandable since the evidence clearly established that these forms were submitted to the ASCS County Committee to establish eligibility for government farm program and payments. Tr. 273-280. The information contained in the forms was used by the County Committee to determine if the applicant met the program criteria, e.g. whether he was "actively engaged in farming." Tr. 289, 309. In determining whether program requirements were met, the

County Committee assumed the representations by the farmer in the submitted documents were accurate; it did not have investigators who could verify the truthfulness of those representations. Tr. 289, 321, 1182-3. Had the committee known that Koster's representations in the submitted documents were untrue, it would not have approved the applicants' participation in the farm program. Tr. 598-9. Certainly this evidence more than established that the statements in the documents submitted by or at the direction of Koster were "capable of influencing the decision of the decisionmaking body" which is all that is required to establish the required element of materiality. Neder v. United States, 527 U.S. 1, 16, 119 S. Ct. 1827, 1837 (1999).

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9 The defendant suggests in his brief that he was thwarted in his attempt to context materiality because the court granted government's motion in limine excluding evidence that "other farmers had obtained approval for plans similar to that which the government claimed was illegal in Koster's case."

Br. 6-7. This suggestion is belied by two facts. First, contrary to any plan by Koster's trial counsel to offer the excluded evidence, the transcript reveals that defense counsel did not even object to the government's motion in limine. Tr. 231-2. Second, and more importantly, the exclusion of evidence regarding action taken by the County Committee on other farmer's applications was entirely proper since the issue of materiality turned on whether Koster's misrepresentations were "capable of influence" and not whether they did influence. Cf. United States v. Reynold, 189 F.3d 521, 525 (7th Cir. 1999)(rejecting argument that defendant was improperly precluded from examining witnesses on issue of materiality where court properly barred evidence that bank would not have relied upon defendant's representations).

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Q And then this farm operating plan was approved, right?

A Yes, it was.

Q And after it was approved, notice was sent to Joseph L.

Michlig that is was approved?

A Yes.

Q And there was never any effort to shield or hide

Mr. Koster's involvment as the farm manager for Joseph L.

Michlig, was there?

A No.

Q And your committee would have been aware of that, correct?

A Yes.

Q And after 1992, for the year 1993, Mr. Michlig would have

relied on that approval, if there were no changes, to file a 1993 update, right? If there were no changes.

A If there were no changes.

Q I mean, isn't it fair to say that for the farmers, after the committee approves it the first time, they're relying on the committee's approval for each year thereafter, unless they change significantly – not just some other smaller part, but some significant change – they're relying on that prior approval to keep them in the program?

A They shouldn't rely on the committee at all in that situation. They are the ones that are responsible for certifying whether there's changes or no changes.

25 Q Absolutely. But subject to no changes, they're going to be

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have attended at that time?

A No.

Q Would there have been a meeting that Mr. Koster would have attended as the farm manager?

A No, I don't believe he did.

Q You didn't need him did you?

A No.

Q I mean, you asked for some documents; you got satisfactory documents; and you submitted those to the committee, right?

A That's correct.

Q Now, everybody knew that Norm Koster was Jerome Lauer's farm person, right, farm manager?

A Yes.

Q In fact, Norm Koster has been involved with these farms for

a time period prior to your becoming the executive director,

right?

A I assume he was.

Q Well, I shouldn't do that. From '86 on Norm Koster was

involved in managing these farms for someone, correct?

A Yes.

Q So, it's no surprise to you that he was managing this farm

for Jerome Lauer, right?

A Right.

Q So, you submit the letter; you get the documents; and the

county committee approves the operation, correct?

approved for the next year?

A Based on the facts as submitted, as I've said before.

Q And I understand that. But they've got to rely on that

approval, right?

A I'm not sure that I agree with that statement.

Q In 1992, after the determination in the spring that Jerome

Lauer was ineligible, was there an effort to make a successor

in interest?

A Yes, there was.

Q And what was that effort?

A I believe Sterling Grain & Storage was established as a

successor in interest.

Q And Sterling Grain & Storage is a corporation, stock owned

by Mr. Koster's wife; is that right?

A Yes.

Q And there are provisions in the regulations that allow for

successor in interest, right?

A Yes.

Q And the successor in interest has to be eligible to receive

the benefit, right?

A That's right.

Q And there has to be a determination that they're eligible,

correct?

A Yes.

Q Now, in 1992 what was the determination with regard to

APPENDIX

Set Aside Program Participants

1986	Koster's father attempted to enroll Rich's Ag lost $40,000.00 – Koster's father lost $50,000.00	
1987	4-D Farms, Inc. *Rich's Ag Service	Joe L. Michlig
1988	4-D Farms, Inc. Joe R. Michlig	Joe L. Michlig
1989	4-D Farms, Inc. Joe R. Michlig	Joe L. Michlig
*1990	4-D Farms, Inc. Jerome Lauer	Joe L. Michlig
*1991	Jerome Lauer	Joe L. Michlig
*1992	Sterling Grain & Storage, Inc. qualified	Joe L. Michlig
*1993	Sterling Grain & Storage, Inc.	Joe L. Michlig
1994	Sterling Grain & Storage, Inc.	

- Rich's Ag was 50% owned by Joe R. Michlig, Joe L. Michlig's father
- years of charged fraud

Appendix J

The falsity of defendant Koster's representations was also unmistakably established by the evidence offered by government. It was undisputed, for example, that Koster prepared and submitted Plans for Lauer and Michlig which represented that both men were farming extensive acreage which they personally rented from various landowners. Tr. 1457, 1495. The falsity of these statements was proven initially by the testimony of the two straw men themselves who both denied ever having rented or personally farmed any of the land in question. Tr. 495-6, 691-2. This testimony was extensively corroborated by the landowners (or their representatives) who swore under oath that they had rented to Norman Koster and not to Michlig and Lauer. Tr. 810, 827, 901, 990. Finally, the truth of the straw men's testimony and, thus, the falsity of Koster's representations to ASCS, was

verified further by witnesses owing allegiance to the defendant.

The defendant's brother-in-law (his wife's brother), for example, affirmed that he had worked for Koster throughout these years and Lauer was nothing other than Koster's hired man while Michlig was not involved in farming at all. Tr. 1094. Indeed, out of more than seven days of trial, 1500 pages of transcripts, and hundreds of exhibits, only Koster himself claimed that the alleged misrepresentations to ASCS were true. Tr. 1459, 1499.

With no one disputing the materiality of the defendant's representations to ASCS and only Koster attesting to their accuracy, it is proper to conclude that the omission of the "materiality of falsehood" element from the jury charge was harmless. Neder v. United States, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837 (1999)(were "omitted element was uncontested and supported by overwhelming evidence, such that the jury

verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless").

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Q And did you personally negotiate farm leases or the land owned by 4-D?

A Yes.

Q And had you done so since the late 1970's?

A Yes.

Q Who has farmed the majority of 4-D's land since about 1980?

A Mr. Koster.

Q And that's Norman Koster?

A Yes.

Q Now, Mr. Moody, just so that there's no confusion about this later, was there another farmer who farmed a small portion of that land at some period of time? Fassler, I believe; is

that correct? Is that the name?

A Well, Fassler farmed a different farm. He didn't farm –

it was part of the 4-D, but it was never par – it was a

separate farming entity.

Q And that was separate from the 840 acres?

A Right, yes.

Q But he did rent some land from 4-D?

A That's right.

Q And that was more like 150 acres or something?

A Right.

Q And I think he did business under Sugar Creek, Inc. or

something of that name?

A I believe that's correct, yes.

Appendix L 2 of 2

agreed to by you and Pete."

Q Okay. And turning the next page to PD-3A and asking do you recognize that?

A Yes.

MR. MEYER: And asking that the jurors be permitted to turn, as well.

THE COURT: They may.

BY MR. MEYER:

Q What is that, PD-3A?

A It's a lease for '86-87'.

Q Okay. And who is the tenant to that lease?

A Elmer Koster.

Q Why is Elmer Koster the tenant on that lease?

A Because after the '85 problems in getting the rent, we were

not confident of Norm's capacity to handle the rent in '86, and

he offered to have his father rent the farm so we had more

confidence in getting the rent.

Q But when you testified earlier, and I asked you about this,

from1980 until today Norm Koster is your tenant, that's not

correct, is it?

A well, no.

Q It's not correct?

A All right. No. You confused me there with those years.

Q I'm not trying to confuse you. But, nonetheless, what

you're doing and saying is Norm Koster is the man I deal with.

would the checks have gone for advance deficiency payments and final deficiency payments?

A To Joe L. and Joe R.

Q They did not go to Norm Koster, right?

A No.

Q Now, Norm, what is the status of your debt at this point in 1989?

A In 1989 we had satisfied – we had come to agreement with some creditors, but the debt was still very large.

Q Okay. Over a million dollars still?

A Over a million, yes.

Q But you had satisfied some of the smaller ones?

A Smaller ones, and I had come to terms as far as an

agreement with the Farmers Home Administration.

Q Okay. And how much had you owed them?

A Including interest, about $600,000.

Q And what did you settle that debt for?

A Four $5,000 payments or a total of $20,000.

Q So, you settled a $600,000 obligation with the –

A Farmers Home Administration for $20,000.

Q For $20,000.00

A Yes.

Q And had you satisfied other debts by paying a pro rata portion of the debts?

A Yes, we did.

Q But then by the time early '91 rolls around, it's a hundred percent owned by your wife?

A That's correct.

Q And the ownership was transferred on advice of legal counsel. Is that what you said?

A That's correct.

Q And early 1991 is precisely when a civil complaint was filed against you, Norm Koster personally, in an effort to recover the prior Commodity Credit Corporation debt, correct?

A I don't recall the date of that. You'd have to refresh my memory.

Q I'll go ahead and show you Government's Exhibit Number 74

and ask you if that's a copy of the civil complaint that was

filed against you.

A Yes, that would be correct.

Q And it's got a file date in the upper left of February

22nd, 1991, correct?

A That's correct.

Q And it was a result of this civil complaint that a consent

judgment was entered in the amount of in excess of $600,000,

right?

A 600,000?

Q Right. The consent judgment that was entered as a result

of the civil action.

A That seems too low.

the foggiest idea what she was signing, and I trusted Norm Koster.

Q You did trust him, but you would have looked at this document, right?

A Yes, but I didn't know anything about farm programs or anything

Q But you knew that Norm Koster was ultimately going to be responsible for your farm, right?

A Yes.

Q And the fact that there was some other entity that was the tenant didn't matter to you, did it?

A Not as long as my land was taken care of and I get my

money.

Q And as long as Norm Koster took care of your land?

A That's right.

Q Now, you didn't have just a farm relationship with

Mr. Koster, did you?

A I would say, yes, the farm.

Q He did some other things for you in 1990, didn't he?

A Yes, Norm built an apartment for me.

Q Okay.

A He did a very fine job.

Q I'll show you what's marked Governmnet's Exhibit 6. You

saw that letter a minute ago. And at the bottom of that it

says something about Commonwealth Edison building site.

Appednix O 3 of 7

correct?

A Yes.

Q And even though Mr. Zuba inplied, perhaps, that they were

in blank, you don't recall they were in blank, do you?

A No.

Q In fact, they could have been filled out, correct?

A Correct.

Q And you would have signed it, correct, because it came from

Norm Koster, right?

A Yes.

Q So, if Mr. Koster was, in fact, the farm manager for Joe

Michlig, as long as you got your money and Norm farmed your

farm, that's all you cared about, right?

A That's all I cared about, yes.

Q And that's the case for each one of these Exhibits, right?

A Yes.

Q The same is true for Jerome Lauer, correct?

A Yes.

Q Okay. Now, going back to 5-90—and your signature

appears on that document, right?

A Yes.

Q Now, you wouldn't have signed this without looking at it,

would you?

A No, but I think the jury has got to understand that many

times I've taken documents home to my wife, and she didn" have

support and production adjustments, correct?

A I'm not - - yes, it is.

Q And you wouldn't have signed this form on behalf of the City of Sterling without at least looking at it, would you?

A As a matter of fact, I probably would have, yes.

Q You just signed it without looking at it because you had already gotten your check for rent?

A I don't think the check would have anything to do with it.

Q Well, you testified earlier that you only rented to Norm Koster, and that's exactly what the lease says; is that right?

A um-hm.

Q Okay. And yet, do you know who the checks came from?

A I believe Mr. Koster.

Q Because it's the check that matters, not necessarily who the tenant is? Yes, no, does it matter?

A To me? No.

Q No, it doesn't matter.

A Not to me.

Q In fact, if you'll look at --

MR. MEYER: If I may.

THE COURT: You may.

BY MR. MEYER:

Q Back to the seven series. If you'll look at 7-90.

MR. MEYER: And ask that the jury got there, too.

THE COURT: They may.

The defendant's unsupported, unsworn allegation that the government induced witness testimony through the undisclosed forgiveness of tax obligations did not result in any prejudice to Koster for one very simple reason: it did not occur. Although certain government witnesses were immunized prior to their testimony, this immunity was well known to the defendant. Moreover, this "use" immunity only protected the witnesses against the use of their testimony in any later proceeding against them; it did not give them "transactional" immunity protecting them from any state or federal effort to collect taxes due and owing, if any. Finally, and most importantly, the government in this case never forgave any tax liability, asked any state or federal agency to forgive any tax liability, or promised any witness such a

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forgiveness of tax liability as an inducement to provide testimony or otherwise. In short, this libelous accusation made by the defendant is not only unsupported, it is untrue and should be ordered stricken from the record.

The defendant's argument that he should be allowed to engage in a fishing expedition to prove this unprovable accusation is equally without merit. The law of this Circuit is clear that a defendant like Koster is not entitled to a hearing on his Section 2255 motion unless it is "accompanied by a detailed and specific affidavit which shows that the petitioner had actual proof of the allegations going beyond mere unsupported assertions." Barry v. United States, 528 F.2d 1094, 1101 (7th Cir. 1976)(quoted with approval in Prewitt v. Untied States, 83 F.3d 812, 819 (7th Cir. 1996)). See Also Aleman v. United States, 878 F.2d 1009, 1012 (7th Cir.

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1989)("Mere unsupported allegations cannot sustain a petitioner's request for a hearing."). Indeed, Rule 2(b) of the Rules Government Section 2255 Proceedings expressly requires a defendant to sign his motion "under penalty of perjury." That Koster has not done so in his motion is understandable – if not excusable – since the bald assertion Koster makes is as false as the misrepresentations he gave to ASCS and perjurious testimony he

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A Yes.

Q Now, you testified earlier this morning that in 1989 you got in the farm program, right?

A Yes.

Q And that Mr. Koster approached you; is that correct?

A Yes.

Q Was anybody else involved in that transaction?

A No.

Q Okay. Nobody else? Your father wasn't involved?

A Oh, he might have. No, he wasn't.

Q Your father wasn't involved in 1989 in any way?

A Not that I recall.

Q Not that you recall?

A No.

Q You understand that your grant of immunity only applies to

what you've testified to and that if you lied this morning that

that grant of immunity doesn't apply?

A Yes.

Q Okay. Now, was your father involved in 1989?

A Yes.

Q Okay. So, when you first answered no or you didn't recall,

that was a lie, right?

A I just didn't - - I didn't understand the question.

Q I'm sorry. You didn't understand the first question?

A No.

Oral Argument in Neder

In the Oral Argument in Ellis E. Neder Jr. v. United States No. 97-1985 from the United States Court Official Transcript, Tuesday, February 23, 1999 commencing on 11:14 A.M., under questioning of Justice Scalia, Mr. Roy W. McLeese III answered, It's difficult to imagine a case in which more than one element would be omitted or misdescribed, and each of those omitted—

If this Court would look at what the jury had at my tial:

1. My attorney;s theory of defense centered around good faith, yet in the end, not getting the instruction on the first trip to this Court my petition for a Writ asked for the good faith instruction. The petition stated, had I lived 40 miles west and asked for good faith, I would have received it.

2. No defense argument on material for false statements.

3. No material instruction for mail fraud.

How many elements can be omitted or misdescribed and still say, harmless

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